

No. 98825-1

No. 79714-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

IN RE THE DEPENDENCY OF:

B.S. (d.o.b. 04/13/18),

a minor child.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

---

BRIEF OF APPELLANT MOTHER

---

JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR. .... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF THE CASE. .... 3

D. ARGUMENT. .... 6

THE DEPENDENCY ORDER SHOULD BE REVERSED  
BECAUSE IT OFFENDS DUE PROCESS ..... 6

a. The Department must establish a child’s dependency by a  
preponderance of the evidence..... 6

b. The admissible evidence fails to support the conclusion that  
B.S. is dependent..... 8

c. The doctrine of collateral estoppel was misapplied by the  
trial court. .... 9

d. The dependency order should be reversed..... 14

E. CONCLUSION. .... 15

## TABLE OF AUTHORITIES

### **Washington Supreme Court**

<u>Henderson v. Bardahl International Corp.</u> , 72 Wn.2d 109, 431 P.2d 961 (1967).....	11
<u>In re Brown</u> , 149 Wn.2d 836, 72 P.3d 757 (2003).....	15
<u>In re Dependency of Brown</u> , 149 Wn.2d 836, 72 P.3d 757 (2003) .....	8
<u>In re Dependency of Schermer</u> , 161 Wn.2d 927, 169 P.3d 452 (2007) 7, 10	
<u>In re J.B.S.</u> , 123 Wn.2d 1, 863 P.2d 1344 (1993).....	6
<u>In re Key</u> , 119 Wn.2d 600, 836 P.2d 200 (1992).....	7
<u>In re Luscier</u> , 84 Wn.2d 135, 524 P.2d 906 (1974) .....	6
<u>In re McDaniel</u> , 64 Wn.2d 273, 391 P.2d 191 (1964) .....	6
<u>In re Moi</u> , 184 Wn.2d 575, 360 P.3d 811 (2015).....	9, 12
<u>In re Myrick</u> , 8 Wn.2d 252, 533 P.2d 841 (1975).....	6
<u>In re Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973) .....	10
<u>In re the Matter of the Welfare of Walker</u> , 43 Wn.2d 710, 263 P.2d 956 (1953).....	7
<u>In re Welfare of Key</u> , 119 Wn.2d 600, 836 P.2d 200 (1992).....	10
<u>In re Welfare of Luscier</u> , 84 Wn.2d 135, 524 P.2d 906 (1974) .....	6
<u>Matter of K.M.M.</u> , 186 Wn. 2d 466, 379 P.3d 75 (2016).....	11

### **Washington Court of Appeals**

<u>In re Dependency of C.B.</u> , 61 Wn. App. 280, 810 P.2d 518 (1991).....	10
<u>In re Dependency of C.B.</u> , 79 Wn. App. 686, 904 P.2d 1171 (1995)...	7, 14

<u>In re Matter of the Dependency of S.R.P.W.</u> , 7 Wn. App.2d 1012, (2019) .....	11, 12, 13
<u>In re the Welfare of Watson</u> , 25 Wn. App. 508, 610 P.2d 367 (1979) .....	7
<u>In re Welfare of X.T.</u> , 174 Wn. App. 733, 300 P.3d 824 (2013) .....	9

**Statutes**

RCW 13.34.020 .....	6
RCW 13.34.030(6)(c) .....	10, 15
RCW 13.34.180 .....	10

A. ASSIGNMENTS OF ERROR

1. The juvenile court erred when it found B.S. dependent.
2. The court violated due process when it entered Finding of Fact 2.2.15, determining “collateral estoppel applies to the findings from the [previous] termination trial.”
3. The court erred by entering Finding of Fact 2.2.16, finding “this court is bound by the findings from the termination trial.”
4. The court erred by entering Finding of Fact 2.2.12, in the absence of substantial evidence.
5. The court erred by entering Finding of Fact 2.2.14, in the absence of substantial evidence.
6. The court erred by entering Findings of Fact 2.2.19 and 2.2.20, as they are not supported by competent, non-hearsay evidence.
7. The court erred by entering Findings of Fact 2.2.21, 2.2.22, 2.2.23, and 2.2.25, as they are legal conclusions entered as factual findings.
8. The court erred by entering Findings of Fact 2.2.22 and 2.2.23, in the absence of substantial evidence the remedial services would have been the same for B.S., as for the older children.

9. The court erred by entering Finding of Fact 2.2.38, in the absence of substantial evidence that appropriately tailored parenting services were offered.

10. The court erred by entering Finding of Fact 2.2.39, in the absence of substantial evidence the recommendations would remain the same for this child.

11. The court erred by entering Finding of Fact 2.2.44, in the absence of substantial evidence.

12. The court erred by entering Finding of Fact 2.2.45, in the absence of substantial evidence.

13. The court erred by entering Finding of Fact 2.2.46, in the absence of substantial evidence.

14. The court erred by entering Findings of Fact 2.2.47, 2.2.48, and 2.2.49, in the absence of substantial evidence.

15. The court erred by entering Findings of Fact 2.2.56, in the absence of substantial evidence.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A parent has a fundamental liberty interest in the care, custody and control of her child. To establish a dependency under RCW 13.34.030(6)(c), the State must prove that there is a danger of substantial damage to the specific child at issue. Here, where B.S. was

seized from the mother in his first few days of life, does it offend due process for the trial court to determine the mother is unfit as a matter of law, and that the court is “bound by the findings” of a previous termination involving the mother’s older children?

2. The doctrine of collateral estoppel has four elements that must be established for its application. Was the doctrine misapplied where the previous proceeding did not share identical issues because the proceeding related to different children and different factual circumstances; there was no final judgment on the merits; and the application of the doctrine works an injustice?

C. STATEMENT OF THE CASE

Sharrah W. is the mother of eight month-old B.S. CP 19. When B.S. was born, a hold was placed on him by Providence Hospital, and he was not allowed to come home with Sharrah and B.S.’s father, Andre S.<sup>1</sup> RP 74-75.

The Department of Children, Youth, and Families (Department) received an intake following B.S.’s birth, citing safety concerns about both parents’ conduct in the hospital. RP 75-76. The Department’s investigation revealed that Sharrah had a history with the Department regarding previous dependencies relating to her older children. RP 77-

---

<sup>1</sup> A dependency was found against B.S.’s father, Andre, at a separate proceeding. CP 43.

79. A dependency petition was filed on April 16, 2018, when B.S. was just three days old. CP 578-86.

The hospital's concerns were minimal – medical staff claimed that Sharrah requested pain medication following the baby's Caesarian birth, when Sharrah was suffering from a large abdominal incision. CP 580. Other than this notation, hospital staff members noted that Sharrah seemed to be “appropriate” with B.S., and that Sharrah reported having all of the items she and her partner needed to bring their baby home. CP 581. The hospital staff member also remarked that Andre, B.S.'s father, appeared to be very sleepy, and that the toxicology screen for B.S. at his birth was negative. Id.<sup>2</sup>

A contested dependency trial was held in January 2019. By that time, Sharrah and Andre had been visiting B.S. for approximately eight months. RP 42-43, 57-58. The Department proceeded to trial without any witnesses who had first-hand information about Sharrah's parenting of B.S. RP 73. The Department did not present testimony from any of the Providence Hospital witnesses who recommended the medical hold; nor did the Department present testimony from Massabily, the social worker who drafted and signed the dependency petition in April 2018. CP 585.

---

<sup>2</sup> A hospital staff member also expressed concern regarding Sharrah's inquiries about the hospital security system. RP 76.

Instead, the Department relied upon the testimony of social work supervisor George Nelson, who had not attending a single meeting with Sharrah or observed her parenting. RP 73. The Department presented no competent evidence from visitation supervisors or monitors who had observed Sharrah's parenting skills. RP 56-59 (testimony presented of driver only; objection sustained as to hearsay statements of foster parents).

The Department also moved to admit the findings from the previous termination of Sharrah's rights to her older three children, which had been ordered by a court of concurrent jurisdiction and was still on appeal. RP 6-9.<sup>3</sup> Sharrah objected to the admission of the findings and the petition from the previous termination, but the court admitted 16 exhibits from the previous case. RP 7-9; Ex. 1-16.

At the conclusion of the trial, the court stated that "but for the fact that you have some findings from this termination case," the court would not have found a dependency against Sharrah. RP 139. The court stated it was bound by the previous findings, although "absent those findings, there is no way there would be sufficient evidence in this case for the court to find a dependency." RP 143.

---

<sup>3</sup> The previous case is No. 78195-2-I. The termination of parental rights matter as to Sharrah's older children, S.R.P.W., K.R.T.W., and K.R.-K.W., went to trial in January 2018. This Court affirmed the termination order on January 14, 2019, and Sharrah's motion for reconsideration was denied on March 4, 2019. Sharrah filed a motion for discretionary review in the Washington Supreme Court on April 1, 2019.

D. ARGUMENT

THE DEPENDENCY ORDER SHOULD BE REVERSED  
BECAUSE IT OFFENDS DUE PROCESS.

Washington courts have recognized that “the full panoply of due process safeguards applies to [child] deprivation hearings.” In re Dependency of G.G. Jr., 185 Wn. App. 813, 826 n.18, 344 P.3d 234, review denied, 184 Wn.2d 1009, 361 P.3d 726 (2015) (internal quotation marks omitted); see also In re Welfare of Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974); In re Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975).

- a. The Department must establish a child’s dependency by a preponderance of the evidence.

The right to “custody, care and nurture of the child” resides first with the parents. Luscier, 84 Wn.2d at 136-37. In dependency cases, the State’s ostensible goal is to nurture the family unit and to keep the family intact “unless a child’s right to conditions of basic nurture ... health, or safety is jeopardized.” RCW 13.34.020; In re J.B.S., 123 Wn.2d 1, 8-9, 863 P.2d 1344 (1993).

The juvenile court obtains jurisdiction over a minor child when he or she is found to be a dependent child, as defined by RCW 13.34.030. In re McDaniel, 64 Wn.2d 273, 276-77, 391 P.2d 191 (1964). To find a child dependent, the court must find by a

preponderance of the evidence that the child meets one of the statutory definitions of dependency. In re Key, 119 Wn.2d 600, 612, 836 P.2d 200 (1992).

A child is dependent if he or she: (1) has been abandoned; (2) has been abused or neglected by a person responsible for his or her care, or (3) has no parent or guardian capable of caring for him or her such that the child's current circumstances constitute a risk or substantial damage to the child psychologically or physically. RCW 13.34.030(6). In re Dependency of Schermer, 161 Wn.2d 927, 943, 169 P.3d 452 (2007). A trial court's findings of fact entered following a dependency hearing must be supported by substantial evidence in the record, and must, in turn, support the trial court's conclusions. In re Dependency of C.B., 79 Wn. App. 686, 692, 904 P.2d 1171 (1995), review denied, 128 Wn.2d 1023 (1996).

A finding of dependency requires proof of present parental deficiencies. In re the Matter of the Welfare of Walker, 43 Wn.2d 710, 715, 263 P.2d 956 (1953). In Walker, the Court noted, "an existing ability or capacity of parents to adequately and properly care for their children is inconsistent with the status of dependency." Id.; see also In re the Welfare of Watson, 25 Wn. App. 508, 512-13, 610 P.2d 367 (1979).

b. The admissible evidence fails to support the conclusion that B.S. is dependent.

While the trial court may consider the family's entire history, a finding of dependency must be based on proof of a parent's *present* inability to care for her children. Walker, 43 Wn.2d at 715; Watson, 25 Wn. App. at 512-13. Accordingly, the Department had to prove Sharrah was *presently* unable to adequately care for B.S., "such that the child is in circumstances which constitute a danger of substantial damage to [his] psychological or physical development." RCW 13.34.030(6)(c); accord In re Dependency of Brown, 149 Wn.2d 836, 72 P.3d 757 (2003).

The court relied on termination findings from a separate proceeding, regarding different children with wholly unrelated needs. CP 44-46. The court explained that "but for" the previous findings, the court would not have found B.S. dependent. The court's reliance upon findings from a separate proceeding – which related to different children and a case which was not final – violates due process. See infra, § c.

The court's discretion at a dependency proceeding "does not permit juvenile courts to disregard evidence rules, especially where the deprivation of parental rights is involved." In re Welfare of X.T., 174 Wn. App. 733, 738, 300 P.3d 824 (2013) (reversing dependency order

for lack of substantial competent evidence). As in X.T., without the improperly admitted findings from the previous termination case and improper and uncorroborated hearsay testimony offered by the Department, there was “scant evidence” B.S. was a dependent child. Id. at 739.

As the trial court remarked following closing arguments, “I really have to say that I do think that the Department sometimes relies on too little in trying to make their case.” RP 139. The court found, “but for the fact that you have some findings from this termination case,” the court would not have found the Department met its burden. Id.

c. The doctrine of collateral estoppel was misapplied by the trial court.

The trial court incorrectly determined that it was bound by the termination court’s findings due to collateral estoppel. CP 44 (FF 2.2.15, FF 2.2.16).

Collateral estoppel applies only where a prior proceeding: 1) involved the identical issue; 2) resulted in a final judgment on the merits; 3) involved the same party; and 4) will not work an injustice as applied. In re Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015). Other than involving identical parties, none of the remaining three criteria are met.

First, the issues or elements in a termination trial are not identical to those in a dependency; the two proceedings are based upon two entirely different statutes. Compare RCW 13.34.180 and RCW 13.34.030(6)(c). “A dependency proceeding and a termination proceeding have different objectives, statutory requirements, and safeguards.” Schermer, 161 Wn.2d at 943 (quoting Key, 119 Wn.2d at 609). In a termination of parental rights trial pursuant to RCW 13.34.180, the Department must prove parental unfitness, and that all six sub-sections of the statute are met, including that necessary remedial services were provided. In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

In a dependency trial pursuant to RCW 13.34.030(6)(c), where a child is alleged to have “no parent capable” of adequately caring for him or her, the Department must prove there is a danger of substantial damage to the child. In re Dependency of C.B., 61 Wn. App. 280, 285, 810 P.2d 518 (1991).

The issues adjudicated in the two trials here involved different issues – indeed, the two cases involved different children altogether. The previous case involved whether Sharrah was “fit” to parent her older three children, whether she was provided the appropriate services related to those older children, and whether she had complied with

those services. The issues in the instant case relate to her new baby, B.S., and whether the Department proved there was risk of “substantial damage” to B.S. There was no identity of issues.

It is important to recall that the statutes in Title 13 are child-specific. Matter of K.M.M., 186 Wn. 2d 466, 490, 379 P.3d 75 (2016) (when considering parental fitness, courts consider a parent’s capabilities to parent “the particular child given the child's specific, individual needs”). The older three children involved in Sharrah’s previous termination case had “many special needs.” In re Matter of the Dependency of S.R.P.W., 7 Wn. App.2d 1012, 2019 WL 181996 \*7 (2019).<sup>4</sup> There was no evidence presented at this trial that B.S. had special needs or that Sharrah was incapable of parenting him. Rather, the evidence showed Sharrah was appropriate with B.S. during visits, both in the community and supervised, and there was no evidence of substantial risk to this entirely separate child. RP 56-62.

Our courts strictly construe the requirement that collateral estoppel only applies to those issues which “were actually and necessarily litigated” in the prior action. Henderson v. Bardahl International Corp., 72 Wn.2d 109, 118, 431 P.2d 961 (1967). Because

---

<sup>4</sup> This opinion has no precedential value and is cited solely to assist the Court. GR 14.1.

there was no identity of issues, the court erred when it applied collateral estoppel.

Second, the prior adjudication was not a final judgment on the merits at the time the Superior Court applied collateral estoppel. See Moi, 184 Wn.2d at 580. At the time of the dependency trial in January 2019, Sharrah's previous termination trial was still on appeal. In re S.R.P.W., 7 Wn. App.2d 1012, at \*6. This Court issued an unpublished opinion affirming the order of termination on January 14, 2019. Id. Sharrah moved for reconsideration of the Court's opinion on February 1<sup>st</sup>. That motion was denied by the Court on March 4<sup>th</sup>. Sharrah moved for discretionary review in the Washington Supreme Court on April 1, 2019. See Dependency of S.R.P.W., No. 97034-3. The Supreme Court denied review on May 16, 2019, when the case became final.

The Superior Court applied collateral estoppel to the previous termination findings on February 8, 2019, when that order would not become a final judgment on the merits for more than three months – until the Supreme Court denied review on May 16, 2019. The court erred by applying the collateral estoppel doctrine.

Third, a court errs when it applies collateral estoppel where it works an injustice. See Moi, 184 Wn.2d at 580. Not only was Sharrah's termination of parental rights case still on appeal, but the

issue on appeal was whether the Department had accommodated her cognitive disabilities and special needs when it provided parenting services. In re S.P.R.W., 7 Wn. App.2d 1012 (2019).

The Department seized Sharrah’s new baby when he was two days old, without giving her a chance to parent him or to participate in appropriate infant-related services. RP 18, 23, 85 (the Department erroneously referred Sharrah to a parenting class for toddlers, and then never referred her for another class). Sharrah testified that her understanding of why B.S. was taken from her was “because my previous kids got terminated, so I was never given a chance to [sic] this one.” RP 18. The Department argued that Sharrah had not complied with referrals from the previous case, and Sharrah thus remained incapable as a parent. RP 129-33. However, Sharrah maintained in the previous case that the Department had failed to provide appropriately tailored services to her, which had interfered with her ability to comply with the referrals and understand providers. S.P.R.W., supra, at \*6.<sup>5</sup>

In fact, Sharrah had argued in the termination case that due to her cognitive difficulties, a neuropsychological evaluation should have been ordered as a remedial service. Id. Although the Department

---

<sup>5</sup> Collateral information indicates that Sharrah’s IQ of 64 was recorded when she was younger. S.P.R.W., 7 Wn. App.2d 1012, at \*6.

objected to this, a neuropsychological evaluation and disability services were both ordered as part of the disposition of the new dependency. CP 52 (Department to explore eligibility for DDA).<sup>6</sup>

In sum, the issues between the two trials were different, the prior adjudication was not final, and application of the doctrine would work an injustice; accordingly, the trial court erred when it found collateral estoppel applied to the findings from the termination trial, and that the court was bound by the findings. CP 44 (FF 2.2.15, FF 2.2.16). In light of the fact the court found, “absent those findings, there is no way there would be sufficient evidence in this case for the court to find a dependency,” this Court should reverse. RP 143.

d. The dependency order should be reversed.

Because the court’s application of collateral estoppel constitutes a violation of Sharrah’s right to due process, the juvenile court’s findings and conclusions are without support in the record and the order should be reversed. In re C.B., 79 Wn. App. at 692. Moreover, to affirm the lower court’s order would be tantamount to declaring that the mother is unfit to parent as a matter of law, regardless of the fact that

---

<sup>6</sup> Sharrah also testified at trial about the ways in which she had improved her life and ability to parent since the previous trial, including attending counseling and finding an apartment. RP 18-19.

she may have a subsequent child with different needs, or that she may learn to improve her parenting skills.<sup>7</sup> This offends due process.

The dependency statute expressly requires evidence a child has no parent capable, or was in “danger of substantial damage.” RCW 13.34.030(6)(c). The Department failed to prove this at trial.

Since the Department failed to carry its burden of proof, this Court should reverse the finding of dependency and order the petition dismissed.

E. CONCLUSION

For the reasons stated above, the mother respectfully asks this Court to reverse its finding of dependency, as it was not supported by the evidence at trial.

DATED this 19th day of July, 2019.

Respectfully submitted,

s/Jan Trasen

---

JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

---

<sup>7</sup> The court found the Department “did not have the opportunity to offer services to the family” between the time of B.S.’s birth and his removal, because he was removed at two days old. CP 44 (FF 2.2.21). The mother assigns error to this finding, as well as to the court’s finding that the Department’s efforts during the previous dependency constitute “part of the reasonable efforts made to prevent the removal” of B.S. at two days old. CP 44 (FF 2.2.22).



# WASHINGTON APPELLATE PROJECT

July 19, 2019 - 4:45 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 79714-0  
**Appellate Court Case Title:** In re the Dependency of: B.S.; Sharrah Viola Wood, App. v. State of WA., DCYF, Res.  
**Superior Court Case Number:** 18-7-00490-6

### The following documents have been uploaded:

- 797140\_Briefs\_20190719164411D1134714\_2673.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.071919-13.pdf*

### A copy of the uploaded files will be sent to:

- evefax@atg.wa.gov
- leslie.e.gilbertson@gmail.com
- rachelk1@atg.wa.gov
- rwogsland@gmail.com

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Jan Trasen - Email: jan@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20190719164411D1134714**